Supreme Court of the United States

OCTOBER TERM, 1953

No. , Original

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS ..... *Complainant*

v.

STATE OF LOUISIANA; STATE OF FLORIDA;
STATE OF TEXAS; STATE OF CALIFORNIA;
GEORGE M. HUMPHREY; DOUGLAS MCKAY;
ROBERT B. ANDERSON; IVY BAKER PRIEST ..... *Defendants*

BRIEF OF THE STATE OF KENTUCKY AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

The Commonwealth of Kentucky, through its Attorney General, files this brief as amicus curiae, as permitted by Rule 27(9)(d) of the Revised Rules of this Court, in support of the petition for rehearing filed by the State of Rhode Island, complainant in the above-styled proceeding.

We respectfully request a rehearing in these cases in which the Court has denied the motions of complainants and urge a rehearing on the following grounds:

I. The per curiam opinion assumes, without so stating, to deny leave of the complainant states to file their suits. The opinion further rules in an advisory capacity on hypothetical questions dealing with law and facts, without concluding but obviously prejudicing the actual complaint or case presented by the complainants. The Court has in effect reached a conclusion without hearing argument on the merits.

The constitutional and legal issues at bar were merely sketched and outlined. The State of Rhode Island has endeavored to impress upon the Court her right to a full and comprehensive hearing on these issues. The complainant states have raised issues of the statutory exercise of constitutional power. They further raise issues as to whether the acts of the defendant states are lawful against the complainant states in view of Public Law 31. Here we are faced with the determination of the constitutionality of legislation prior to its immediate effect in the context of a concrete case. The Court should not and probably does not intend to deliver an advisory opinion dealing with vital phases of the sovereignty of the Federal Government and its relations between the states and involving permanent and conclusive surrender of valuable natural resources which the Court has unequivocally held belonged to the United States. The Court could not mean this and yet the defendant states by their interpretation of Public Law 31 have so construed it. This Court has never made a practice of dealing with statutory or constitutional power in an abstract manner, as stated in International Longshoremen's Union v. Boyd, decided March 8, 1954, "Determination of the . . . constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and ab-

stract an inquiry for the proper exercise of the judicial function." Thus the Court has changed positions as nimbly as a football team at half-time. An issue of such far reaching consequences should be decided only after exhaustive argument on the merits and full consideration of the law and facts.

II. The defendant states in asserting power over property of the United States are doing so without Public Law 31 having been validated, or properly interpreted.

The Court has always been extremely cautious in its interpretation of legislative grants of public property and has stayed stringently within the precise wording of the grants. See Caldwell v. United States, 250 U.S. 14, in which the Court stated, "Nothing passes but what is conveyed in clear and explicit language." See also Mr. Justice Jackson's remarks in United States v. Five Gambling Devices, which was handed down December 5, 1953:

> "The principle is old and deeply embedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative. United States v. Rumely, 345 U.S. 41. This is not because we would avoid or postpone difficult decisions. The predominant consideration is that we should be sure Congress has intentionally put its power in issue by the legislation in question before we undertake a pronouncement which may have far-reaching consequences upon the powers of the Congress and the powers reserved to the several states. To withhold passing on an issue of power until we are certain it is knowingly precipitated will do no great injury, for Congress, once we have recognized the question, can make its purpose explicit and thereby necessitate or avoid decision of the question."

Thus we contend that Public Law 31 does not give in

precise or explicit language the rights in off-shore resources to defendant states as they are so claiming. Whatever the defendant states may contend, it is obvious that the statute does not clearly make such grant. On the other hand, all lands acquired by the Federal Government in a proprietary capacity have been clearly excluded in Public Law 31 to prevent legal opposition to an unfair distribution or termination of property belonging to the United States to some of the states only and not to all the states. These lands in contention are excepted in Public Law 31, notwithstanding the fact that they were acquired in a proprietary capacity by the United States. It is quite obvious that the United States acquired by purchase or cession in a proprietary and sovereign capacity all lands off the shores of the defendant states. Title to the Florida and Louisiana lands came by purchase from foreign sovereigns while Texas ceded her claim by accepting membership in the Union and making herself equal to all other states of the Union. Consequently, if the off-shore lands were originally property of the United States, such lands would remain so by the terms of Public Law 31.

CONCLUSION

The per curiam opinion does not discuss the sufficiency or insufficiency of the defenses. The Court has not conclusively ruled on the allegations of the complainant. It has merely condensed procedural problems into a conclusion without settling the whole controversy. It is essential that there be a complete consideration by the Court of the statutory questions raised by the petition for a rehearing, questions preliminary to any constitutional determination. Therefore, Kentucky respectfully requests this Court to grant the petition for rehearing.

J. D. BUCKMAN, JR.
Attorney General

EARLE V. POWELL
Assistant Attorney General

COMMONWEALTH OF KENTUCKY

Certificate of Counsel

We hereby certify that this petition for rehearing is prepared in good faith and not for delay.

We further certify that a copy of this petition for rehearing has been served on all parties of record by mailing a copy of same to them, postage prepaid.

J. D. BUCKMAN, JR.
Attorney General

EARLE V. POWELL
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COMMONWEALTH OF KENTUCKY